

UNITED STATES
v.
ESTATE OF MILDRED MUCK AND CLEO WIMMER

IBLA 81-472

Decided November 24, 1982

Appeal from decision by Administrative Law Judge E. Kendall Clarke declaring unpatented limestone placer mining claims null and void. OR MC 2496, OR MC 2497, OR MC 2498, OR MC 2730, and OR-09072.

Affirmed.

1. Mining Claims: Marketability

The Department contested the validity of four unpatented limestone placer mining claims and the associated millsite contending the limestone from the claims was unmarketable. Following hearing, the Administrative Law Judge correctly declared the claims null and void where the evidence established the material from the claims could not have been marketed at a profit.

APPEARANCES: William B. Murray, Esq., for appellants; Lawrence E. Cox, Esq., Office of the Solicitor, Pacific Northwest Region, for Bureau of Land Management, appellee.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On February 26, 1981, a decision issued for the Department declaring four limestone placer mining claims and a millsite invalid in actions brought by the Oregon State Director, Bureau of Land Management (BLM), in contest Nos. OR MC 2496 (Portland Rock), OR MC 2497 (Virginia), OR MC 2498 (Carly Ann), OR MC 2730 (Terry), and OR-09072 (millsite in sec. 13, T. 37 S., R. 7 W., Willamette Meridian, Josephine County, Oregon). Appellants Estate of Mildred Muck and Cleo Wimmer challenge the holding only as it affects the Terry and Carly Ann claims. 1/ The sole issue raised on appeal concerns

1/ Evidence showing no improvements were made on the millsite and no limestone was found on the Portland Rock and Virginia mining claims is undisputed.

whether there is a market for the limestone found on the Terry claim, the Administrative Law Judge having ruled that appellants' evidence failed to preponderate in favor of a showing they could profitably operate the claim. 2/

The testimony before the fact-finder also focused upon whether the limestone found upon the Terry claim is presently marketable. The Administrative Law Judge found, and the record establishes without question, that limestone from the Terry claim is of high quality, usable for industrial purposes which do not require whiteness. Appellant's claims were made in 1940. In 1976 approximately 3,000 tons of limestone from the Terry claim were sold for agricultural purposes. There is no proof of prior or subsequent production from the claims. Photographs of the Terry claim show it has been quarried. About 6.4 million tons of limestone remain on the claim, which has not been worked at least since 1980. A nearby limestone quarry previously mined for many years by the Ideal Cement Company has been idle since 1967. A portion of the limestone deposit found on the Terry claim extends onto an adjacent patented claim which is not worked.

Three witnesses, David E. Sinclair, Gerbin R. Kingma, and T. T. Leonard, testified concerning the agricultural limestone market and projected costs of the business of selling limestone from the Terry claim in Oregon. 3/

2/ The question on appeal concerns the sufficiency of the evidence offered by appellants in opposition to the Government showing that the limestone could not be profitably produced. The standard for review is that stated by the Board's opinion in United States v. Alaska Limestone Corp., 66 IBLA 316, 319 (1982):

"When the Government contests the validity of a mining claim for lack of a discovery of a valuable mineral deposit, the ultimate burden of proof is upon the mining claimant. The Government, however, bears the initial burden of going forward with sufficient evidence to establish a prima facie case that no valuable mineral discovery has been made. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Bechthold, 25 IBLA 77 (1976); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). Even if the Government merely shows that one essential criterion of the discovery test was not met, it has established a prima facie case as to that criterion. See United States v. Hooker, 48 IBLA 22 (1980); United States v. Taylor, *supra* at 28, 75.

"Once the Government has established a prima facie case that the claim is not supported by discovery, the burden of going forward then shifts to the contestee to overcome the Government's showing by a preponderance of the evidence. Humboldt Placer Mining Co. v. Secretary of the Interior, 549 F.2d 622 (9th Cir.), *cert. denied*, 434 U.S. 836 (1977); United States v. Springer, 491 F.2d 239 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974); Foster v. Seaton, *supra*; United States v. Harris, 38 IBLA 137 (1978)."

3/ The record establishes that a prior use for limestone in paper pulp manufacture was substantially eliminated by changes in the paper making process (Tr. 23-24). The same is also true to a lesser degree of the agricultural use of lime, which now is diminished by the use of chemical fertilizers which possess the chemical properties of lime without the disadvantage of its bulk (Tr. 27). The Board notes the distinction between material which provides a chemical alteration or amendment of the of the soil (which is locatable under the mining law) and material which provides only a physical alteration

Sinclair, a geologist and section chief for BLM, testified limestone in place was to be found only on the Terry claim. He testified the local market for agricultural lime in southern Oregon would absorb about 2,000 tons annually. He pointed out that limestone from the contested claims has not been supplied to this hypothetical market. Sinclair calculated the claims could not be profitably worked because the cost of equipment needed to operate them, which he estimated to be not less than \$150,000, when combined with the cost of hauling the processed limestone to market, estimated at \$0.10 per mile, would raise the price above the going market average for agricultural limestone (Tr. 25). ^{4/} Sinclair concluded that a prudent operator would not be justified in spending his time and money to develop the Terry or Carly Ann claims (Tr. 23-25). On cross-examination, he buttressed this conclusion with the observation that the southern Oregon limestone simply could not compete in the distant Willamette Valley market with cheap limestone already being supplied from Canada (Tr. 71-72).

Appellants' witness, Kingma, assumed, for the purposes of his testimony, the existence of a market for 50,000 tons of agricultural limestone annually in the Willamette Valley. Kingma, a former cement plant production manager and chemist, testified for appellants that limestone from the Terry claim could be furnished to the distant hypothetical market he postulated at a profit which would justify the expenditure of time and money in the development of a limestone quarry of the Terry claim (Tr. 98-99). He was unable, however, to calculate the cost of equipment for an operation producing 50,000 tons of processed limestone annually for the agricultural market, and his calculation simply omits that cost factor (Tr. 97-98). Although the contemplated market entails a haul of 160 or more miles, he had no experience, as a plant production manager, in calculating hauling costs or mining costs (Tr. 101). He acknowledged the cost of production increases dramatically when the quantity of production decreases so that a production of less than 50,000 tons annually would change the estimate he provided by increasing the cost of mining (Tr. 103-04). The cost to crush and grind the limestone is estimated by him at \$5 per ton (Tr. 96).

Appellants' witness, T. T. Leonard, an octogenarian who has been in the "limestone business" for 40 years, also assumed a market for 50,000 tons of limestone annually in the vicinity of Tangent, Oregon, based upon information received from the University of Oregon. He stated that current prices at Tangent at the time of his testimony were \$20.50 per ton for agricultural limestone, although there was already a stockpile of 150,000 tons of Canadian lime stored there ready for market (Tr. 108). Leonard owns limestone deposits himself and feels the business will ultimately be profitable (Tr. 114), but current market conditions and the existence of the cheap Canadian lime have forced him to adopt a wait-and-see posture (Tr. 108).

fn. 3 (continued)

of the soil (which is not locatable). See United States v. Beal, 23 IBLA 378 (1976), and cases cited therein.

^{4/} The current market price varies from \$25 to \$35 per ton (Tr. 28).

Appellants seek to distinguish several issues within the main question which they raise concerning marketability. ^{5/} They argue: (1) The Administrative Law Judge erred when he found the relevant market for lime was limited to 2,000 tons annually; (2) it was error to interpret Leonard's testimony as an opinion the current market is not favorable to limestone mining operations; (3) it was error to conclude an exploitable market for 50,000 tons of lime annually did not exist in the Tangent vicinity; (4) appellant proved costs of production would favor development of the claims by evidence which effectively rebutted the Government's contrary showing; (5) the fact adjacent claims of similar quality limestone are shut down is irrelevant to this proceeding; and (6) the fact work on these claims was shut down for several years prior to contest is irrelevant to this proceeding. Appellants also seek to distinguish several prior Board decisions cited by the fact-finder below, and argue they have satisfied the four-part test set out in the court's opinion in Charlestone Stone Products Co. v. Andrus, 553 F.2d 1209, 1214 (9th Cir. 1977), rev'd, 436 U.S. 604 (1978), and have satisfied the criteria for demonstrating market demand and an ability to meet demand at a competitive price set out in Melluzzo v. Morton, 534 F.2d 860 (9th Cir. 1976). The claimed factual errors are first considered.

The gist of testimony by Sinclair was that the only feasible market for appellants' limestone was in the southern area of Oregon which was limited by market conditions to 2,000 tons annually. While appellants sought to show they were able to reach a larger market in the more distant Tangent area, the record taken as a whole shows that it was not possible for lime from the Terry claim to compete in the more distant market owing to the added cost of transportation by road and the existence of a supply of cheap Canadian lime which was delivered to the Tangent vicinity from a developed source by barge. Sinclair's testimony in this regard was direct and credible on the pertinent issues of cost and demand. It was also supported by the testimony of appellants' witness, Leonard, who declared his own present unwillingness to enter a market dominated by the Canadian source of supply. While, as appellants observe in their brief, Leonard did comment upon his advanced age, it is clear from his entire testimony that his decision to stay out of the limestone market presently was based entirely upon his business estimate of the market and not upon personal considerations. Leonard's testimony that a large stockpile of unsold limestone remained in the Tangent area (priced below the apparent cost to appellants to produce and deliver a similar product) indicates the hypothetical market assumed for the Tangent area by appellants' witnesses for the purpose of estimating production costs most probably does not exist. Sinclair's unchallenged testimony that commercial fertilizer was effectively competitive with lime in Oregon also clouds the testimony by both appellants' market witnesses, whose evidence concerning the need of the soil for treatment of the type afforded by lime does not address the degree

^{5/} Appellants also argue they should prevail because the contest in this case was inspired by improper motives on the part of BLM. The Administrative Law Judge correctly ruled at the hearing that the agency's purpose in bringing a contest action is immaterial to the merits of the contest. The record establishes as a fact that the contest was brought upon a BLM recommendation based upon an investigation of the claims which indicated that they were not valid (Tr. 55).

to which that need is now satisfied by other products. The testimony of Kingma was fragmentary: it failed to establish either the present existence of an alternative market or a complete cost analysis of the projected mining operation it purported to describe. Kingma's testimony in no way diminished the evidence offered by BLM which denied the claims' potential.

The cost estimates supplied by Sinclair and Kingma, taken together, establish that appellants' cost to deliver lime to the Tangent area exceeds \$21.50 per ton, the current price (according to Leonard) for the stockpiled lime unsold at Tangent. That amount (\$21.50) also approximates the cost of commercial fertilizer fortified with chemical equivalents for lime. These circumstances, when considered with the known fact that limestone mines in the southern Oregon vicinity of appellants' claims are shut down, and that appellants' mine was also closed for several years because it was unable to continue to operate at a profit indicate there is no exploitable market for lime which appellants can profitably supply.

The standard which appellants invoke to establish the validity of their claims is summarized by the court's opinion in Melluzzo v. Morton, supra at 862 (citing United States v. Coleman, 390 U.S. 599 (1968)), to be whether

the deposits discovered were "valuable mineral deposits" under 30 U.S.C. § 22. The recognized test is the "prudent man test" (whether the deposits were of such a character as to justify a man of ordinary prudence in expending further labor and means with a reasonable prospect of success in developing a valuable mine); as complemented by the "marketability test" (whether the mineral could be extracted and marketed at a profit). [6/]

The Melluzzo decision, principally relied upon by appellants, is instructive in this case, since it discusses and distinguishes several prior holdings by the Ninth Circuit Court of Appeals dealing with applications of the "marketability test" to mining claim contests relevant here. Describing an application of the marketability standard used in Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972), the court in Melluzzo observes:

6/ Prior Board decisions summarize the general rule of law concerning the "marketability test" somewhat differently. See, for example, United States v. Alaska Limestone Corp., supra at 319 (also a decision involving a limestone placer mining claim), which states:

"A discovery of valuable minerals under Federal mining laws exists only where the minerals found are of such a character that a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. United States v. Coleman, 390 U.S. 599 (1968); Chrisman v. Miller, 197 U.S. 313 (1905); Castle v. Womble, 19 L.D. 455, 457 (1894). This 'prudent man test' has been refined to require a showing of marketability; that is, a showing that the mineral in question can be presently extracted, removed, and marketed at a profit in order to establish that there has been a discovery of an economically 'valuable' mineral deposit within the context of 30 U.S.C. § 22 (1976)."

In * * * [Verrue] we held that lack of evidence of sales of material from the claims involved, together with evidence of an abundance of similar material in the area, did not suffice to overcome a showing of value. See also United States v. Gibbs, 13 I.B.L.A. 382 (1973).

Verrue was not the last word of our court on this subject. In Clear Gravel Enterprises, Inc. v. Keil, 505 F.2d 180, 181 (9th Cir. 1974), we stated:

While the marketability of the mineral could have been demonstrated by the Appellant by a showing of its accessibility, its proximity to the market, the demand for it and by the Appellant's bona fide efforts to develop the claims and compete in the market with the product extracted from those claims, nonetheless, the record demonstrates that Appellant's evidence fell far short of the required showing.

534 F.2d at 862, 863.

The court then provides an analysis of these cases:

We construe the two cases together as holding that lack or insubstantiality of sales of material from the claims in question is relevant to the question of marketability. It is not, however, conclusive proof of lack of value. The inference to that effect, when all evidence is considered, can be found to have been overcome by evidence of marketability.

534 F.2d at 863. The court concludes the opinion with a statement analyzing market value in relation to the operation of a valid claim in terms which appellants contend describes the proofs adequately made by them at the hearing in this case:

It is the market value of the material above cost of extraction and transportation (including labor) with which we are concerned. For the material to be regarded as economically valuable the market price must include such a value or profit element or increment, and it is that increment attributable to the material itself (rather than to the labor and equipment involved in producing and transporting it to the market) that must prove attractive to the prudent man.

Two profit factors can be drawn into question in considering whether a claimant's material, although it had not been marketed at a profit, nevertheless could have been marketed at a profit:

1. The cost factor. It must appear that the cost of extraction, preparation for market and transportation to market will, in the claimant's case, provide a value increment or profit comparable to that which attaches to the material being successfully marketed by others.

2. The demand factor. It must appear that the local demand was able to absorb additional material such as the claimant's and still permit an attractive profit to be realized. It is for that profit that the newcomer, under Barrows, must be permitted to compete. [Footnote omitted.]

534 F.2d at 863, 864.

[1] Review of the record establishes that appellants have neither proven they are able to produce within current market limits of cost so as to enable them to sell at a profit, nor have they shown a local demand exists which is able to absorb their material under conditions permitting a profit to be made by a "newcomer." Appellants have postulated an operation based upon a minimum production of 50,000 tons of limestone annually to enable them to keep the cost of production within commercially feasible limits. There is, however, a local market available to them capable only of absorbing a maximum of 2,000 tons annually. A larger and more distant (and therefore, more costly) market may arguably exist near Tangent, but it is already over-supplied from Canadian sources. Another producer, Leonard, has considered attempting to enter that market, but has refrained because of a current oversupply. Moreover, technological developments affecting the use of limestone in both agriculture and manufacturing have diminished the entire Oregon market for lime.

The evidence of record, thus, simply fails to support appellants' contention they have shown their claims can be profitably operated. Appellants' failure to show they have access to a sufficient market where a demand exists for lime, considered with their failure to operate the claims for any extended period of time since location in 1940, fully supports a conclusion these claims are invalid because the market value of the limestone found does not justify the cost of production. The fact-finder below correctly determined the claims and millsite should be declared null and void.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge
Alternate Member

We concur:

Edward W. Stuebing
Administrative Judge

Douglas E. Henriques
Administrative Judge